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DEC 8 1969

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1969

No. 18

In the Matter of the Application of

MARTIN ROBERT STOLAR,

Petitioner.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

REPLY BRIEF

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REPLY BRIEF

The respondents' brief is a rather puzzling one: (1) it is a confession by avoidance in declining to meet squarely the First Amendment issue presented in the petition for certiorari and in petitoner's brief; (2) it treats the First Amendment obliquely by asserting the relevance of the questions put to applicants; (3) it gives an incredible and self-defeating explanation for the particular questions put to applicants; and (4) it misconstrues the purpose and application in this case of the privilege against self-incrimination.

I.

The Case Directly Involves the First Amendment.

Respondents' only answer to petitioner's principal argument—*i.e.*, based upon his First Amendment rights—is that it was not "properly and timely brought in issue" (Resp. Br. p. 1).[1] Respondents are in error in suggesting that "the

[1] "Resp. Br." refers to respondents' brief; "Pet. Br." to petitioner's brief; "a" to the single Appendix.

Fifth Amendment . . . is the only basis given by petitioner for his refusal to answer the questions involved herein" (Resp. Br. p. 1).

On the contrary, petitioner raised this issue in the Bar admission proceedings on at least three occasions: (1) During the personal interview he stated "that such questions go to matters not properly within the subject matter of such an inquiry" (29a). (2) On February 10, 1969, he was more explicit by writing the committee that his "answers to such questions are protected by the First and Fifth Amendments of the United States Constitution" (31a). (3) On February 24, 1969, his counsel wrote to the Supreme Court of Ohio pointing out that "Mr. Stolar has therefore grounded his refusal to answer the three questions involved on both the First and Fifth Amendments to the Constitution" (44a). That Court rejected those arguments without opinion (55a). Accordingly, the petition for certiorari was based principally on the First Amendment; Ohio did not oppose certiorari upon its present theory; the grant of certiorari was not limited. It is regrettable that the respondents apparently believe that their present position permissibly avoids a direct response to the basic First Amendment argument made in petitioner's brief.

II.

Petitioner's First Amendment Position is Supported by Respondents' Explanation of Their Questions.

While respondents have not adressed themselves directly to petitioner's arguments and to the decisions of this Court upon which petitioner relies, they have done so obliquely by arguing that the state had a legitimate objective. However the nature of their response gives new grounds in support of petitioner's First Amendment position.

Respondents' first claim is that Ohio has a substantial interest in "trustworthy" persons (Resp. Br. p. 3), *i.e.* those with "moral qualifications" (*id.* at p. 4). This is only the beginning of the problem for even a legitimate objective may not constitutionally be achieved by means which "[diminish] the exercise of rights so vital to the maintenance of democratic institutions." *Schneider* v. *State*, 308 U.S. 147, 161; see also *Thornhill* v. *Alabama*, 310 U.S. 88, 96; *United States* v. *Robel*, 389 U.S. 258, 265-268.

Petitioner's principal brief had established three basic respects in which the means used by Ohio violated the rule of precision applicable in First Amendment cases (Pet. Br. pp. 23-37); they need not be repeated here. More fundamentally, respondents fail to meet petitioner's argument (Pet. Br. p. 17) that an applicant's political history bears no reasonable relationship to the valid concern of Ohio for professional trustworthiness and competence. This being so, Ohio's test violates this Court's decision that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP* v. *Button*, 371 U.S. 415, 439; *Mine Workers* v. *Illinois Bar Assn.*, 389 U.S. 217, 222.

Respondents have given for the first time a most unusual and we think self-defeating explanation for their questioning applicants concerning organizational membership. "The answers *might* disclose the names of associates who have known petitioner intimately for some period of time. The committee could then turn to these persons to resolve any questions in their minds as to the applicant's qualifications" [Resp. Br. p. 6 (italics supplied)]. In short, the reason is not the nature of the organizations, but the possibilities of inquiry of an unlimited number of acquaintances. On this theory, respondents could have adopted the more direct approach of requiring petitioner to name every person whom he had ever known. Ohio's inquiry thus turns out to be a more drastic and sweeping search than the

more limited, although concededly wide ones, found constitutionally defective by this Court in *Shelton* v. *Tucker*, 364 U.S. 479 and *Schneider* v. *Smith*, 390 U.S. 17.

In *Shelton*, an equally unlimited number of organizations was called for—but there was a time limit of five years. Nevertheless, this Court characterized the requirement as "an unlimited and indiscriminate search" (*Schneider* v. *Smith, supra* at 24) of a teacher's associational past. Such a search of "every conceivable kind of associational tie" netting "relationships [which] could have no possible bearing upon the teacher's occupational competence or fitness . . . (*Shelton* v. *Tucker, supra* at 488) goes far beyond which might be justified in the exercise of the state's legitimate inquiry" (*Id.* at 490).

Schneider v. *Smith, supra*, was an inquiry into membership in 250 designated organizations in contrast to the present inquiry which encompasses *any* organization which might ultimately be deemed by the committee to advocate overthrow of the government. Recognizing the infirmities of such an unlimited political inquiry, the Court, in *Schneider* felt compelled to read the statutory delegation involved "narrowly so as to avoid questions concerning 'associational freedom' that *Shelton* v. *Tucker* protected and concerning other rights within the purview of the First Amendment." *Schneider* v. *Smith, supra* at 27.

Factual differences between *Shelton* and *Schneider* and the present one do not make inapplicable the broad principles enunciated by the Court. Respondents argue that the teachers in *Shelton* did not have "tenure" (Resp. Br. p. 3); applicants for the bar are in the same unenviable position . Ohio argues that there is no "chilling effect" because membership in an organization does not necessarily exclude applicants from the bar (Resp. Br. p. 7) this was equally true in *Shelton*.

Further, there are two distinctions between this case and *Shelton* which run in favor of petitioner. In *Shelton* the associational interrogation was found to be relevant to the state's inquiry; it was the sweeping method used that was considered improper. 364 U.S. at 488. In contrast, this case has two defects in addition to the sweeping nature of the questions: irrelevancy and remoteness. Relevance is absent by reason of the lack of connection between moral character and political association, however invidious. See Pet. Br. pp. 17-33. Remoteness exists since "the background information" (Resp. Br. p. 7) at most "*might* disclose names" (italics added) and such a reservoir of names might produce information which might be derogatory. All this despite the fact that the questions call for organizations while the respondents now call for names. In sum, as in *NAACP* v. *Alabama*, 357 U.S. 449 and in *Bates* v. *Little Rock*, 361 U.S. 516, there is here no substantially relevant correlation between the governmental interest asserted and the information which the state compels the applicant to disclose. *Cf. Shelton* v. *Tucker*, *supra* at 485.

Respondents seek to justify their sweeping search with the makeweight argument that "there is no other practical way for the committee to obtain such information" (Resp. Br. p. 7). There are three answers to this claim: first, as shown in our principal brief, Ohio is not entitled to such information, regardless of the means used; second, the state is required to use methods not in violation of constitutional rights even though they require some financial expense. *Cf. Griffin* v. *School Board*, 377 U.S. 218, 233; *Bloom* v. *Illinois*, 391 U.S. 194; *United States* v. *School District 151 of Cook County, Illinois*, 301 F. Supp. 201, 232 (N. Dist. Ill. 1969); third, the states have access to the inexpensive investigating facilities of the National Conference of Bar Examiners. See discussion in *Application of Burke*, 351 P. 2d 169 (Ariz. 1960); Farley, *Character Investigation of Applicants for Admission*, 24 Bar. Exam. 147 (1955).

The respondents raise an unreal issue when they suggest that applicants "assume" that the committee and the court below would abuse their discretionary powers (Resp. Br. p. 10). Petitioner's First Amendment rights may not be made to depend upon the good faith or self-restraint of the respondents. See *Baggett* v. *Bullitt*, 377 U.S. 360, 373-374. The unfortunate history of repression against members of the Bar for political dissent [2] teaches that like prosecutors, those in charge of regulating the Bar, too, are human. See *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 286-287.

Nor does the availability of review in this Court of unlawful exclusion from the Bar diminish or justify the threat to the exercise of First Amendment rights posed by the Ohio screening program. See *Dombrowski* v. *Pfister*, 380 U.S. 479, 486, 494; *Baggett* v. *Bullitt*, *supra*, at 378-379. Moreover, delays, which in some cases have involved many years of litigation (see *Konigsberg* v. *State Bar*, 366 U.S. 36; *In re Anastopolo*, 366 U.S. 82) and the inevitable notoriety preceding vindication of an applicant's First Amendment rights in this Court will "itself effect the impermissible chilling of the very constitutional rights" sought to be protected. *Zwickler* v. *Koota*, 389 U.S. 241, 252.

Thus what is relevant here is not alone the question of how the respondents will treat the petitioner but the effect of Ohio's program upon the young men and women in colleges and law schools who, knowing of Ohio's program, will refrain from legitimate political activity. See *e.g.*, *Speiser* v. *Randall*, 357 U.S. 513, 526. The mere existence of an investigational apparatus which, because of its imprecision "lends itself to selective enforcement"

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[2] See, *e.g.* Brown and Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. Chi. L. Rev. 480, 495-496 (1963); 1 Emerson, Haber and Dorsen, *Political and Civil Rights in the United States*, 263-283 (1967); Countryman and Finman, *The Lawyer in Modern Society* (1966).

or "is susceptible of sweeping and improper application" will not be tolerated, even in its dormant state, in the area of First Amendment freedoms. *NAACP* v. *Button*, *supra*, at 433, 435; see also *Whitehill* v. *Elkins*, 389 U.S. 54, 61-62; *Smith* v. *California*, 361 U.S. 137, 151; *Speiser* v. *Randall*, 357 U.S. 513, 526.

III.

Petitioner's Assertion of the Privilege Against Self-Incrimination is a Legitimate Bar to the Inquiry.

Respondents' argument that the compelled disclosure does not "require any applicant to incriminate himself" (Resp. Br. p. 10) overlooks a series of cases under the Smith Act, 18 U.S.C. 2385, ranging from *Dunne* v. *United States*, 138 2d 137 (8th Cir. 1943), *cert. denied*, 320 U.S. 790, through *Dennis* v. *United States*, 341 U.S. 494, to *Scales* v. *United States*, 367 U.S. 203.

Respondents assume incorrectly that petitioner's reliance upon the privilege is based exclusively upon the use of the information in the bar admission proceedings (Resp. Br. p. 10); instead, the privilege is asserted because such information can be used in proceedings *dehors* the instant one.

This Court's most recent decision on the subject in *Spevack* v. *Klein*, 385 U.S. 511, cannot be distinguished from the instant case upon the basis of respondents' arguments (Resp. Br. p. 8). "There is no independent evidence of misconduct" (*ibid*) here any more than in *Spevack*. Petitioner is no more a governmental employee than was Mr. Spevack. And as in *Spevack* the burden of proof in a Bar admission case is on the state where First Amendment rights are involved. See *Speiser* v. *Randall*, *supra*.

Nor are the other cases relied upon by the respondents apposite. In neither *Konigsberg* v. *State Bar of California,* 366 U.S. 36, nor *In re Anastaplo,* 366 U.S. 82, was the privilege asserted by the applicant. *Orloff* v. *Willoughby,* 345 U.S. 83, was an unusual case involving the right of a military commission and duties in the Army. In the light of the dissenting opinions in *Orloff* as well as the majority opinions in *Spevack,* it may be doubted that this Court would come to the same conclusion today.

Finally, it may be noted that even if the petitioner were regarded as a government employee, the broad questions put to the petitioner do not involve the narrow questions relating to one's job performance, upheld by this Court in *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation,* 392 U.S. 280.

CONCLUSION

The order below should be reversed with instructions to admit petitioner to the Ohio Bar Examination.

Respectfully submitted,

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December 5, 1969